

REMARKS

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I. Introduction

JUL 26 2006

Claims 1-5 are pending in the above application.

Claims 1-5 stand rejected under 35 U.S.C. § 102(e).

Claim 1 is the only independent claim.

II. Prior Art Rejections

Claims 1-5 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Slivka et al. (U.S. Pat. No. 6,049,671) (hereafter "Slivka").

Anticipation under 35 U.S.C. § 102 requires that each and every element of the claim be disclosed in a prior art reference as arranged in the claim. See, *Akzo N.V. v. U.S. Int'l Trade Commission*, 808 F.2d 1471 (Fed. Cir. 1986); and *Connell v. Sears, Roebuck & Co.*, 220 USPQ 193, 198 (Fed. Cir. 1983).

Applicant continues to traverse the rejection as done so in the past several responses on March 21, 2006, September 19, 2005 and July 19, 2005, each of which are incorporated herein. Unfortunately, despite continued explanations of the differences between the Slivka reference and the claims, the examiner has maintained the rejection and has presented arguments addressing Applicant's explanations. The examiner is respectfully reminded that a rejection under 35 U.S.C. § 102 requires actual disclosure of all of the claimed elements as arranged in the claims to be disclosed in a single reference. *Supra*. An argument, no matter how eloquent or clever can never be a substitute for a factual determination of the existence of all of the claimed elements in a reference. In short, either the reference discloses all of the claimed limitations or

not, neither an argument nor an alleged "concession" can create the existence of a factual claim element in a reference.

The examiner's response to Applicant's explanations amplify the fact that the Slivka reference itself does not in fact disclose all of the claimed elements as required to anticipate the claims. The response latches onto an apparent misconception that Applicant has allegedly asserted that the cabinet files correspond to such, stating "Applicant further argues that the cabinet files of Slivka, corresponding to the claimed configuration file, correspond to a program or group of programs, whereas 'the claimed configuration file corresponds to a network element'". Final Office action mailed 5/26/06, pg. 2. However, Applicant's previous remarks are presented below:

More particularly, the cabinet files of Slivka, *which are presumed to be alleged to correspond to Applicant's claimed "configuration file"*, correspond to a particular program or group of selected programs for download. Whereas Applicant's claimed configuration file corresponds to a network element. In this regard, Slivka is concerned with allowing a program vendor to provide programs for download (e.g. for sale) to a user without being corrupted. Slivka, col. 18: 55-60. Indeed, Slivka provides a list of (sic) programs and updates and allows a user to choose which ones they want. Slivka, col. 8: 6-32. Slivka is not concerned whether or not the network element itself is authorized to operate a program, Slivka simply provides an on-line "store" to allow a user to pick and choose any program desired.

Applicant's response filed 3/21/06, pg. 3. Applicant has not characterized the "configuration file" as corresponding to claimed cabinet files. Rather, Applicant was attempting to identify the examiner's interpretation as to how Slivka is applied to the claims and then explain why, assuming the examiner did make such interpretation, Slivka does not disclose the claim elements. While the Applicant believed this approach would advance prosecution, unfortunately, the manner in which the Slivka reference is supposed to meet this claim limitation is still not clear despite the fact the Slivka has now been applied against the claims for at least three Office actions.

The Slivka reference simply does not disclose the claimed configuration file. The claims describe the configuration file as "including a load table which defines a plurality of authorized components for said network appliance", the Slivka reference does not disclose such. Rather than establishing that the Slivka reference discloses such limitation, the examiner asserts that "although the cabinet files do correspond to particular software programs (as explained in Applicant's previous response), they also correspond to a user." Final Office action, pg. 3, material in brackets added for context, and bold added for emphasis. Accordingly, while Applicant's claims require a configuration file which "defines a plurality of authorized components for said network appliance", the examiner appears to attempt to meet this limitation by alleging that a "user" is a "network appliance", as best understood by Applicant. The short response to such allegation by the examiner is that it is clear that Slivka simply does not disclose the configuration file as claimed. Moreover, Applicant respectfully submits that the apparent equating of a "user" to a "network appliance" is unreasonable and is contrary to any interpretation which would be made by one of skill in the art.

Moreover, once equating a user to a network, the examiner goes onto bootstrap to this fiction by further alleging that Slivka implies the claimed configuration file. Particularly, the examiner states:

The Examiner notes that listing software that is available to the user *or appliance* at least implies that the user *or appliance* is therefore authorized to download the software (otherwise it would not be "available"). Applicant appears to concede this point by stating that "listing available software for download does implicate an authorization of the network element" (... noting again that it is assumed that "network element" is intended to refer to the claimed network appliance").

Final Office action mailed 5/26/06; pg 3, bold and italics added for emphasis. As discussed above, anticipation can only be met by a reference disclosing all of the claimed elements. An alleged implication of disclosure is not a disclosure of the claim elements and does not satisfy the

requirements of 35 USC § 102. Moreover, an implication which is bootstrapped to equating a user with a network appliance and supported by the rationale of what the examiner believes is needed to make the download of Slivka available¹ is far afield from the actual disclosure of the Slivka reference. Finally, the fact that the examiner attempts to justify the bootstrapped implication by latching on a clear typographical error in Applicant's discussion and ignoring the context of the quoted phrase from Applicant's explanation to allege that "Applicant appears to concede this point" merely highlights the lack of disclosure of Slivka. Not only can a factual question of the disclosure of a reference or a simple scientific truism not be created by an alleged concession, but it is clear that no such concession has been made. The entire paragraph from which the phrase was lifted is as follows:

The Office action appears to equate Slivka's listing of programs available for download with "authorizing" a network element to access the programs. Office action mailed Dec. 21, 2005, pp. 2-3. However, there does not appear to be any disclosure in Slivka to support the contention. Merely listing available software for download does *not* implicate an authorization of the network element. Notably, in one embodiment discussed in Applicant's disclosure, the configuration file is already contained in the network element prior to being authorized. Application, pg. 3: 4-8; Fig. 1, step 104.

Applicant's response filed 3/21/06, pgs. 3-4, bold and italics used to denote the typographical error. Clearly, Slivka does not in fact disclose Applicant's claimed configuration file, and the factual deficiencies of Slivka cannot be cured by creative argument.

Accordingly, as Slivka does not disclose each and every element of the claims, as set forth in the claims, Slivka does not anticipate the above claims.

¹ If the examiner believes that Slivka is not enabled as disclosed, then Slivka cannot be used as reference, i.e. prior art must be enabled to be used under 35 U.S.C. § 102.

III. Conclusion

Having fully responded to the Office action, the application is believed to be in condition for allowance. Should any issues arise that prevent early allowance of the above application, the examiner is invited contact the undersigned to resolve such issues.

To the extent an extension of time is needed for consideration of this response, Applicant hereby request such extension and, the Commissioner is hereby authorized to charge deposit account number 502117 for any fees associated therewith.

Date: 7/26/06

Respectfully submitted,

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